Supreme Court, U. S.
FILED
MAY 24 1977
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1517

RICHARD E. JACOBS, et al.,
Petitioners,

vs.

LEONARD W. SAPP, RALPH HURWITZ, and
CHARLES ROBBINS,
Respondents.

RESPONDENTS' BRIEF

In Opposition to the Petition for Writ of Certiorari

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In Opposition to the Petition for Writ of Certiorari

QUESTION PRESENTED

Respondents respectfully submit that a Writ of Certiorari to review the holding of the Court of Appeals in this case should be denied. Petitioners' Brief distorts the holding of the Court of Appeals, in an effort to create the appearance of a conflict with decisions in other circuits. In fact, the Court of Appeals, in its ruling herein, did no more than reaffirm the doctrine of *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Association*, 484 F.2d 751 (7th Cir. 1973), *cert. den.*, 414 U.S. 1131 (1974) (hereinafter, "*Cherney*"). In *Cherney*, the Court of Appeals held that factual jurisdictional issues in

complex antitrust cases such as the case at bar should be determined only "after a thorough exploration of all evidence that either side can produce . . ." 484 F.2d 751, 759. That holding was based upon rulings by this Court and upon decisions in other circuits. The holding and principle are sound, and are consistent with the policies of the anti-trust laws of the United States, as well as those of the Federal Rules of Civil Procedure. The holding in *Cherney* was brought before this Court for review on a petition for certiorari, and same was denied. The issue is now well settled, in accordance with sound principles of law. Review of same by writ of certiorari in the instant case would be unwarranted and inappropriate, and should be denied.

As will be discussed below, the decision of the Court of Appeals in no way presents a question ". . . of whether a Court of Appeals can exclude a certain class of civil cases from the operation of Rules 12 and 56, Federal Rules of Civil Procedure, whether a Court of Appeals can ignore and obviate pre-trial procedures established by a district court pursuant to Rule 16, Federal Rules of Civil Procedure, and whether the application of the principle enunciated by the Court of Appeals constitutes an impermissible invasion into the province of district court decision making," as stated by petitioners (Brief, p. 3). Further, the decision is not in conflict with decisions from other circuits, but is completely harmonious with the principles recognized in cases presenting similar questions. Accordingly, the writ should not issue on these purported grounds.

Another basis for denial of review in this cause is that any questions raised by the ruling of the Court of Appeals overruling the Trial Court dismissal of respondents' First Amended Complaint are rendered totally moot by the Court of Appeals

holding permitting the filing of respondents' Second Amended Complaint (which petitioners have not challenged). The posture of the cause below is that the case will proceed to trial on the Second Amended Complaint. Therefore, certiorari to review dismissal of this pleading would be totally superfluous, and should be denied.

STATUTES AND RULES INVOLVED

In addition to the statutory provisions and rules of the Federal Rules of Civil Procedure cited by petitioners, respondents respectfully direct the attention of the Court to the following provisions of the Federal Rules of Civil Procedure:

Rule 8, Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> (a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim, shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends . . .
>
> (e) *Pleading to Be Concise and Direct; Consistency.* (1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleadings or motions are required.

STATEMENT OF THE CASE

Respondents adopt petitioners' Statement of the Case, with the following additions necessary for completeness and accuracy. (Also, because petitioners have submitted selected excerpts from the "Concise Summary of the Essential Facts Which Plaintiffs Expect to Prove" (hereinafter referred to as "Concise Summary") we have included relevant statements from that document in the Appendix to this Brief.)

A. The Plaintiffs' Claims

The jurisdictional allegations of plaintiffs' First Amended Complaint are set forth verbatim in the decision of the Court of Appeals below, reprinted at page A-6 of Appendix A to Petitioners' Brief. In substance, these were that the development of respondents' shopping center (hereinafter, the "SHR" site or project) or the development of petitioners' "White Oaks" project, and the subsequent operation of either or both of these regional shopping centers, would substantially effect interstate commerce in that millions of dollars in goods or merchandise would flow into and out of said shopping center or centers annually in interstate commerce, and that the actions of defendants and the conspiracy between them were undertaken to restrain trade in interstate commerce, destroying potential competition and substantially effecting interstate commerce.

Further, in their "Concise Summary," prepared in obedience to the standing Pre-Trial Order of the Trial Court, respondents as plaintiffs set forth the following propositions: That respondents Sears and May, the major department store tenants of the White Oaks Center, are New York corporations doing substantial interstate business; that respondents had been engaged in the effort to develop the SHR property at the site of a re-

gional shopping center from early 1971 to April 1973, and had been actively engaged in soliciting potential tenants for same up to April 1973; that development of a regional shopping center which could successfully compete with the White Oaks Center as developed after the improper actions of respondents has become an impossibility; that two competing regional shopping centers could have been developed in the Springfield area prior to and but for the actions of petitioners, which had as their purpose of elimination of actual and potential competition for the White Oaks Center; that the White Oaks Center, as developed, will generate annual retail business in excess of Fifty Million Dollars ($50,000,000), of which more than half will originate out of state (Appendix A to Respondents' Brief).

B. **Proceedings Below**

Following the filing of the First Amended Complaint by respondents, all petitioners filed elaborate motions, supported by substantial memoranda of law, to dismiss or stay the action on the basis of numerous procedural and substantive issues. None of the issues raised included any supposed defects in the jurisdictional allegations of the First Amended Complaint. All of said motions were heard by the Trial Court, and were overruled in a fifteen-page decision filed on January 17, 1975.

Following the decision of the Trial Court on these motions, extensive discovery was undertaken by all parties, including respondents. On July 25, 1975, the Trial Court ordered the cause set for jury trial on January 12, 1976.

At no time during any of the discovery and other pre-trial proceedings, including the pre-trial conference of December 12, 1975, was the sufficiency of the jurisdictional averments of the First Amended Complaint challenged or even referred to by

counsel for any of petitioners. No discovery was undertaken by any party with respect to the jurisdictional averments of the First Amended Complaint, and no fact record was ever made with respect to them. The issue of subject matter jurisdiction was first raised by the filing by petitioner May Department Stores of a motion for summary judgment, on December 23, 1975. All other respondents thereafter filed motions to dismiss the First Amended Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure.

The Trial Court on January 7, 1976 entered an order continuing generally the January, 1976 trial setting. The parties were ordered to brief the issues raised by the various motions, and oral hearing was set for January 30, 1976. Argument on the motions was heard in chambers, and respondents were not afforded the opportunity to present evidence on the issue of jurisdiction. At the January 30, 1976 hearing, respondents moved the Court to grant leave to amend their First Amended Complaint if the motions to dismiss were sustained.

By order entered February 20, 1976, the Trial Court sustained the motions to dismiss, without granting leave to respondents to amend their Complaint. On March 17, 1976, respondents filed a motion for leave to file their Second Amended Complaint. The motion was denied by the Trial Court on April 9, 1976, after the Notice of Appeal from the dismissal had already been filed. The denial of leave to amend was briefed and argued by respondents in the Court of Appeals. The Court of Appeals held that this was an abuse of discretion, and that permission to amend should have been granted. (Appendix A to Petition, at A-7)

ARGUMENT

A. Certiorari Should Be Denied Because the Decision of the Court of Appeals Was Sound and Consistent With the Purposes of the Anti-Trust Statutes, the Federal Rules of Civil Procedure, and All Relevant Case Law.

1. **The principle adopted by the Court of Appeals is sound.**

The Court of Appeals held that the Trial Court erred in ruling against respondents on the question of whether the actions of petitioners, as alleged by plaintiffs-respondents, involved trade "in [interstate] commerce" or intrastate commerce which has a "substantial effect" upon interstate commerce, thereby giving rise to subject matter jurisdiction, without a proper evidentiary hearing. In so ruling, the Court of Appeals relied upon its earlier holding in *A. Cherney Disposal Company v. Chicago and Suburban Refuse Disposal Association*, 484 F.2d 751. In its opinion herein, the Court of Appeals, quoting from the *Cherney* decision, stated,

> "In essence, the test is whether '[t]he facts of the particular situation . . . determined [that the] relationship to interstate commerce is too tenuous in a practical sense to warrant federal control.' We hold that such a conclusion can better be determined after a thorough exploration of all evidence that either side can produce, rather than by a motion to dismiss . . ." (Petitioners' Brief, Appendix A, at A-2)

The Court went on to hold,

> "The trial judge in the case here, while recognizing the principle we have elucidated, unfortunately took the position that the 'bare bones complaint . . . fleshed out by all the factual allegations which the defendants [*sic*] now assert they can prove . . .' furnished a sufficient basis for a definitive determination of the jurisdictional issue. We are of the opinion that this was an incorrect approach. The plaintiffs [Respondents herein] should have been permitted to produce all the evidence available to them before determining the effect on commerce issue." (Petitioners' Brief, Appendix A, at p. A-4)

The holding of the Court of Appeals for the Seventh Circuit in *Cherney*, reaffirmed in the decision below, that the issue of interstate commerce involvement or effect for jurisdictional purposes can properly be determined only on the basis of "a thorough exploration of *all* evidence that either side can produce," *Cherney*, 484 F.2d 751, 759, is completely appropriate because the factual questions presented by such an inquiry are necessarily so intimately related to the total factual setting of the case that it is impossible to segregate them for summary determination. Accordingly, these issues can only be determined properly upon a thorough evidentiary record. The same consideration has been recognized by this Court, in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), where it was stated,

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." 368 U.S. 464, 473.

It has long been recognized that there are types of cases "where the question of jurisdiction is dependent on decision on the merits," *Land v. Dollar*, 330 U.S. 731, 735 (1947). This is true frequently, if not always, in anti-trust cases involving a Sherman Act jurisdictional issue which requires determination of whether particular restraints "substantially affect" interstate commerce. Certainly, in the case at bar, the question of whether the restraints alleged by the plaintiffs "substantially" affected interstate commerce is for all practical purposes inseparable from the question of the existence of a restraint on commerce in the

first instance. The same principle is recognized in *McBeath v. Inter-American Citizens for Decency Committee*, 374 F.2d 359 (5th Cir. 1967), where a district court dismissal on motion asserting lack of subject matter jurisdiction was overruled. There, the Fifth Circuit Court of Appeals held,

> "However, where the factual and jurisdictional issues are completely intermeshed the jurisdictional issues should be referred to the merits." 374 F.2d 359, 363.

It is also well established as a general rule, not merely limited to the anti-trust area, that in cases where the jurisdictional issues are closely related to the merits, these issues should not be disposed of summarily, by motion:

> "When the jurisdictional issue is inextricably intertwined with the merits of the case, the courts have generally held that the former should not be decided summarily, but should await a trial on the merits." 2A *Moore's Federal Practice* (2d Ed. 1975), § 12.09, p. 2298.

In light of this principle, recognized by this Court as well as other Courts of Appeals, petitioners' assertion that it is somehow offensive to the Federal Rules of Civil Procedure to require a proper evidentiary hearing on the Sherman Act jurisdictional issue where this is intimately related to the merits, is obviously unsupportable. On the contrary, the approach urged by petitioners and adopted, erroneously, by the Trial Court, clearly conflicts with the sound rule recognized since *Land v. Dollar, supra*, that jurisdictional questions should not be decided without a proper evidentiary record when these issues are intimately related to the merits of the case.

Further, the approach urged by petitioners would, if adopted, run squarely contrary to the principle of notice pleading under Rule 8, Federal Rules of Civil Procedure. Rule 8(a) requires "a

short and plain statement of the grounds upon which the Court's jurisdiction depends . . . " Rule 8(e) requires each averment of a pleading to be "simple, concise and direct." These goals would be totally frustrated if Sherman Act plaintiffs could be subjected to possible dismissal of their claim on the eve of trial, on the basis that they failed to incorporate in their original pleadings all jurisdictional facts and evidence which they would be in a position to prove at trial. Such an approach would be absurd, and would ultimately require plaintiffs continually to amend their pleadings to incorporate facts and evidence obtained in discovery. The requirement of a proper evidentiary hearing on Sherman Act jurisdictional matters adopted by the Seventh Circuit in *Cherney* and in the case at bar is based upon this Court's holdings in *Land v. Dollar* and *Poller v. Columbia Broadcasting System, Inc., supra*. This same principle is recognized by decisions from other circuits. It is sound, and should not be challenged.

2. The effort by petitioners to suggest that the decision of the court of appeals herein somehow interfered with the pre-trial procedures established by the trial court is totally unwarranted.

The effort by petitioners to obtain dismissal of the action on the basis of documents filed by respondents as required by the standing Pre-Trial Order of the District Court herein constituted a gross and flagrant effort to abuse the pre-trial procedures envisioned by Rule 16, Federal Rules of Civil Procedure. The Trial Court's use of same as a basis for its ruling was clearly erroneous, and further reflects the impropriety of attempting to decide the Sherman Act jurisdictional question without a proper evidentiary record.

As was required by the "Standing Order on Pre-Trial Conferences" in effect in the District Court at the time, respondents

on December 12, 1975 filed, along with numerous other required filings, a twenty-eight page document styled "Plaintiffs' Concise Summary of the Essential Facts Which Plaintiffs Expect to Prove." In the introductory portion of said "Concise Summary," respondents included the following caveat:

> "The following statement has been developed in compliance with this Court's 'Standing Order on Pre-Trial Conference. It is a compilation of essential facts which plaintiffs expect to prove in support of their various counts against defendants. A substantial number of witnesses who will be called by plaintiffs are adverse and the factual situation herein involves many transactions extending over a period of some three years. *Accordingly, no effort is made to recite each item of evidence which may or will be developed.* Rather we limit ourselves to 'essential facts' as provided for in the Order." (Respondents' Brief, Appendix A, at p.A-1, emphasis added)

Notwithstanding this caveat, the Trial Court, in ruling upon the motions to dismiss, extracted certain statements from the "Concise Summary" in a fragmentary fashion, and proceeded to treat these as a statement of "all factual premises which plaintiffs now assert they can prove." (Petitioners' Brief, Appendix A, at p.A-22)

It should be noted that respondents had expressly included the question of interstate commerce effect in their "Recital of Contested Issues of Law and Fact," (another required pre-trial filing under the Trial Court's standing Pre-Trial Order), thus clearly indicating their intent to present evidence on this issue at trial over and above the statements in the Concise Summary. More importantly, it should be borne in mind that no question had been raised by any part of the suit regarding subject matter jurisdiction as of the date of filing these pre-trial documents. No effort had been made to explore the subject in discovery, and no factual record of any source existed at this

time. Insofar as respondents were aware at the date of the pre-trial conference, the question of jurisdiction was not a significant fact issue. Certainly, respondents could not have been precluded from presenting evidence on the issue at trial merely because a minutely detailed statement of evidentiary facts in this regard was not included in the "Concise Summary." Such arbitrary application of pre-trial procedure constitutes an abuse of discretion, as was held in *Peter Eckrich and Sons, Inc. v. Selected Meat Company*, 512 F.2d 1158 (7th Cir. 1975):

> "Rule 16 was never intended to be a trap for unwary counsel and their litigants. The Rule itself indicates that these conferences are held in order to produce agreement among the parties and the trial judge as to the scope of the issues in the particular case and the admission of uncontested items of evidence." 512 F.2d 1158, 1163-64.

The refusal of the Court of Appeals to accept the Trial Court's equation of the "Concise Summary" with a full evidentiary record of all facts available to plaintiffs in regard to the jurisdictional issue in no way derogated the policy of Rule 16 of the Federal Rules of Civil Procedure, with respect to local pre-trial rules. On the contrary, the attempt to use respondent's pre-trial filings against them in a harsh and preclusionary fashion was itself an abuse of the Pre-Trial Order, and contrary to the purpose of Rule 16.

3. **The decision of the Court of Appeals in no way interferes with the trial court's determination of jurisdiction.**

The suggestion made at pages 13 and 14 of petitioners' Brief that the requirement of a proper evidentiary hearing for determination of Sherman Act jurisdictional issues somehow deprives a Trial Court of determination of jurisdictional issues is groundless. Nothing in the *Cherney* decision or the decision in the case

at bar precludes a district court from passing on the jurisdictional issue, so long as this is done upon the basis of an *adequate* evidentiary record, and where the plaintiff is afforded an opportunity to develop and present all available evidence. The Court of Appeals in *Cherney*, and in the instant cause, held that these issues were decided on an inadequate record, without plaintiffs having a full opportunity to develop *all* facts available to them. Contrary to the arguments made by petitioners, the Court of Appeals did not hold that in *all* cases the jurisdictional issue must be tried. It did so hold in this case under its facts and circumstances. That holding is preeminently correct.

In this regard, the instant cause contrasts forcefully with that in cases such as *Diversified Brokerage Services, Inc. v. Greater Des Moines Board of Realtors*, 521 F.2d 1343 (8th Cir. 1975), cited by petitioners at p. 15-16 of their brief. We respectfully direct this Court's attention to the facts set forth in the passage there cited. The defendants in *Diversified Brokerage Services* also filed a motion to dismiss for lack of jurisdiction. The Trial Court *reserved* its ruling on the motion, and set a pre-trial conference at which the plaintiffs were specifically directed to adduce *all* of their evidence with respect to the interstate commerce requirements of the Sherman Act. The Court then proceeded to rule on the basis of that evidence. The Court of Appeals held,

> "Under these circumstances, *where appellants were given ample opportunity to present evidence on the interstate nexus* and afforded a full opportunity for discovery, we do not believe it would be appropriate for us to now remand this case to the district court for further proceedings." 521 F.2d 1343, 1347 (emphasis added).

Contrast the situation in *Diversified Brokerage Services* with that in the case at bar, where the jurisdictional issue was not raised until the eve of trial, after all discovery had been completed, and the parties had participated in the final pre-trial conference and completed all required pre-trial filings. The

Trial Court then proceeded to rule the motions solely upon the strength of the pleadings, and a few statements in the pre-trial filings. Unlike *Diversified Brokerage Services*, where the plaintiffs were "given ample opportunity to present evidence on the interstate nexus," in the proceedings herein respondents were totally denied such opportunity.

4. **The holding of the court of appeals herein is consistent with decisions from other circuits.**

Petitioners' effort to create the appearance of a conflict between the holding of the Seventh Circuit in *Cherney*, and in the instant cause, derives from the same misconstruction of these holdings discussed above. The cases cited by petitioners at pages 14 through 16 of their brief, supposedly in conflict with the position of the Court of Appeals herein, prove, on inspection, to be completely consistent with it. The cases of *Rosemound Sand & Gravel Company v. Lambert Sand & Gravel Company*, 469 F.2d 416 (5th Cir. 1972), *Diversified Brokerages Services, Inc. v. Greater Des Moines Board of Realtors* (discussed above), and other cases cited by petitioners at page 16 of their brief, all recognize the principle that the plaintiffs in a Sherman Act case must be given the opportunity to develop an adequate factual record on jurisdictional issues where these are closely related to the merits. In fact, the *Rosemound Sand & Gravel Company* case was cited by the Seventh Circuit *in support* of its holdings herein and in *Cherney*. It upheld a Trial Court decision on subject matter jurisdiction, on the basis that the plaintiff there was *not* "foreclosed from submitting all of the jurisdictional facts to the court." 469 F.2d 416, 418. Such a situation presents a total contrast to that which obtained in proceedings below.

Contrary to petitioners' argument, the position taken by the Seventh Circuit in the *Cherney* decision, and in its decision herein, is completely consistent with the decision of this Court, and with the decisions of Courts of Appeals from other circuits.

B. **Certiorari Should Be Denied Because the Issued Raised by Petitioners Is Now Moot.**

Respondents' appeal from the decision of the Trial Court sustaining the motions to dismiss the First Amended Complaint herein, and the subsequent decision of the Court of Appeals overruling the Trial Court, arose from the Trial Court's refusal to grant leave to respondents to file an Amended Complaint curing the supposed defects found by the Trial Court. Respondents' Second Amended Complaint was submitted to the Trial Court with a motion for leave to file same after the dismissal of the First Amended Complaint, but the Trial Court refused to permit the filing of the amended pleading. Respondents in their brief and argument to the Court of Appeals challenged this refusal as an abuse of discretion by the Trial Court, and the Court of Appeals so held (Petitioners' Brief, Appendix A. at p. A-7). *Petitioners have not challenged this ruling by the Court of Appeals, either in their Petition for Rehearing En Banc or in their present Petition for Writ of Certiorari.*

Even if this Court could find some merit in the issues raised by petitioners regarding the holdings in *Cherney* and in the suit at bar, in the present posture of the case at bar they were completely moot. By virtue of the ruling of the Court of Appeals on the denial of respondent's motion for leave to amend, it is not necessary for this Court to review the decision of the Seventh Circuit overruling the Trial Court's dismissal of the First Amended Complaint because that pleading now is effectively abandoned. The cause can now proceed upon the *Second* Amended Complaint, which was prepared by respondents in response to the supposed defects found in their earlier pleading by the Trial Court. It scarcely bears repeating that this Honorable Court does not sit to decide propositions of law which are not, in fact, presented to it by an actual controversy between the parties to litigation.

> "The duty of this Court . . . is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decision. But the Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing, in issue in the case before it." *State of California v. San Pablo & Tulare Railroad Company*, 149 U.S. 308, 314 (1893).

Accordingly, the writ of certiorari should be denied on this ground also.

CONCLUSION

For all of the foregoing reasons, and upon the authorities cited, the Petition for Writ of Certiorari should be denied.

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APPENDIX

APPENDIX A

Excerpts From Plaintiffs' Concise Summary Of Essential Facts Which Plaintiffs Expect to Prove

The following statement has been developed in compliance with this Court's "Standing Order on Pre-Trial Conferences." It is a compilation of essential facts which plaintiffs expect to prove in support of their various counts against defendants. A substantial number of witnesses who will be called by plaintiffs are adverse and the factual situation herein involves many transactions extending over a period of some three years. Accordingly, no effort is made to recite each item of evidence which may or will be developed. Rather we limit ourselves to "essential facts" as provided for in the Order.

Some facts referred to herein have been the subject of stipulation.

1. Plaintiffs are citizens of the State of Illinois. Defendants Richard E. Jacobs, David H. Jacobs, Dominic Visconsi, R. F. Coffin, and Edward H. Crane are citizens of the State of Ohio, and the Springfield Joint Venture is a partnership organized in and under the laws of the State of Ohio. Defendant Edward H. Crane is an attorney and is counsel for the Springfield Joint Venture as well as for Jacobs, Visconsi & Jacobs, Inc., in which all of said defendants are principals.

2. Defendant Sears, Roebuck & Company is a corporation organized under the laws of the State of New York, having its principal place of business in the State of Illinois. Defendant Paul Barker is a resident of the State of Illinois. Defendant May Department Stores Company is a corporation organized and existing under the laws of the State of New York, having its principal office and place of business in the State of Missouri,

but doing business in the State of Illinois. Each (Sears and May) respectively owns and operates a national chain of retail department stores.

3. May operates approximately 103 department stores throughout the United States under various names including the name "Famous-Barr," under which name nine department stores are operated in the St. Louis, Missouri area and under which name May will operate a department store in the White Oaks Shopping Center, Springfield, Illinois, when the shopping center opens. May further operates fifteen discount stores under the name "Venture," a warehouse store at St. Louis, Missouri and some catalog showrooms.

4. Sears owns and operates in excess of four hundred department stores throughout the United States and a number of catalog stores. Sears has for a number of years owned and operated a free-standing store on South Grand Avenue in Springfield, Illinois. Sales in recent years have been in excess of $14,000,000 annually and the store is regarded by Sears as a satisfactory and successful one.

5. Plaintiffs Leonard W. Sapp, Ralph Hurwitz and Charles Robbins are and were at all times herein mentioned the owners in equal shares of all of the beneficial interest in a certain tract of land held in Trust No. PL 3478 with the Illinois National Bank of Springfield, Illinois. Said tract of land, which is part of the corpus of said trust, is 154 acres in size and is located at the northeast corner of Chatham Road (Highway 4) and the South By Pass around the City of Springfield, Sangamon County, Illinois. From 1971 until April 20, 1973 (and to a limited extent thereafter) plaintiffs were actively engaged in endeavors to develop from 100 acres to 120 acres of said tract of land for commercial purposes as a regional shopping center and for related uses. They employed planners and architects, advertised, solicited prospective retail occupants and took many

other steps towards establishing such a regional shopping center.

* * * * * * *

14. All defendants acting in concert and individually performed various acts to cause Sears, May, Myers Bros. and Wards to locate stores in the White Oaks Shopping Center, to the end that:

(a) No other regional shopping center would or could be developed in the Springfield market area;

(b) The Sapp site could not be developed as a regional shopping center;

(c) There would and could be no competition for the White Oaks Shopping Center as a regional shopping center, and no other regional shopping center could be developed in the Springfield market area.

(d) Two regional shopping centers (each with two major department stores, or at least a total of no more than five) would not be developed. Although this would have been possible economically, competition would have been greater, the "market" would have been fragmented and the consumer public would have had a choice of regional shopping centers instead of being required to come to one.

Sears and Jacobs knew that Sears could locate in White Oaks at any time and that White Oaks had not finalized plans because of the fear that Sears would locate in a different regional shopping center. They further knew that Hahn-Newman was capable of developing a regional shopping center. They eliminated Hahn-Newman by convincing plaintiffs that Sears would only locate in a shopping center developed by Jacobs and Sears and Jacobs then had the option of locating in either White Oaks or the Sapp site.

APPENDIX B

Excerpts From Plaintiffs' Recital of Contested Issues of Law and Fact

6. Did the actions of defendants prevent plaintiffs from developing and establishing a regional shopping center on the Sapp site and thus restrain trade in interstate commerce, destroy potential competition and substantially affect interstate commerce?